# Bala Krishnan a/l Kaliannan v Ritz Garden Hotel (Cameron Highlands) Sdn Bhd

HIGH COURT (KUANTAN) — CIVIL SUIT NO 21–1 OF 1996
HELILIAH J
19 JULY 2007

*Evidence — Documentary evidence — Secondary evidence — Sufficiency of evidence — Whether plaintiff able to establish his case*

*Land Law — Sale of land — Breach of contract — Whether there was a breach of sale and purchase agreement — Whether there was a variation of the terms of agreement*

The plaintiff and defendant executed an agreement for the sale and purchase of a piece of land for RM1,000,000. The plaintiff in its claim alleged that the defendant failed to make full payment of the purchase price, failed to obtain the necessary approvals from the relevant authorities and had unlawfully caused the Pahang Registrar of Titles to register the transfer of the land in the name of the defendant although the full purchase price had yet to be paid to the plaintiff. The plaintiff claimed, inter alia, for the agreement to be terminated by reason of breach, the deposit sum of RM250,000 paid by the defendant be retained by the plaintiff towards settlement of damages, an order pursuant to s 417 of the National Land Code 1965 for the rectification of the register of titles for the plaintiff to be restored as the lawful registered owner and for general damages. The defendant claimed there was a variation of the agreement and pursuant thereto the balance purchase price was also adjusted. The defendant counterclaimed, inter alia, for a declaration that the parties had agreed for the balance purchase price to be RM650,000 and that the said sum was payable after the removal of the caveats and upon vacant possession being given.

**Held**, ordering the defendant to complete the sale:

(1) It could not be that for the plaintiff's own case it was the defendant which had to establish that payments were not received. It was for the plaintiff to establish what he had received were not part of the payments. The agreement did not stipulate the time frame within which the balance sum of RM750,000 which should be deemed to have been paid by the purchaser issuing a total of 20% ordinary share in the paid up capital of the purchaser' company was to be complied with. Moreover it was found that the gap in the plaintiff's case might also suggest that the plaintiff on his own volition had acquiesced in the changes in the implementation of the provisions of cl 2 of the agreement. The plaintiff's

conflicting evidence and the lack of probative value to be given to the documents which were secondary evidence had not assisted in establishing the plaintiff's allegation of an unlawful transfer based on lack of consent or let alone fraud (see paras 12–14).

(2) On the part of the defendant however, the case for the counterclaim was also not established (see para 15).

(3) The plaintiff had on a balance of probabilities failed to establish a case for their claim as averred in the statement of claim. However with the land already transferred, the defendant having equally failed to account for the alleged settlement of a varied price was required to settle the remainder of the amount of purchase price as full settlement of the purchase price within a reasonable time after and upon a removal of all the caveats lodged in respect of the land (see para 22).

**[Bahasa Malaysia summary**

Plaintif dan defendan telah memasuki satu perjanjian untuk jual beli sebidang tanah untuk RM1,000,000. Plaintif dalam tuntutannya mengatakan bahawa defendan telah gagal untuk membuat bayaran penuh harga belian, gagal memperoleh kelulusan yang diperlukan daripada pihak berkuasa berkaitan dan secara tidak sah mengakibatkan Hak Milik Pendaftar Pahang mendaftarkan pindah milik tanah tersebut dalam nama defendan meskipun harga belian penuh masih belum dibayar kepada plaintif. Plaintif menuntut antara lain agar perjanjian itu ditamatkan oleh sebab perlanggaran, jumlah deposit RM250,000 dibayar oleh defendan ditahan oleh plaintif untuk menunggu penyelesaian ganti rugi, satu perintah menurut s 417 Kanun Tanah Negara 1965 untuk pembetulan kepada pendaftaran hak milik itu agar plaintif dikembalikan sebagai tuan punya berdaftar yang sah dan untuk ganti rugi am. Defendan mendakwa bahawa terdapat pengubahan perjanjian dan menurutnya baki harga belian juga telah diubah. Defendan menuntut balas, antara lain, untuk satu deklarasi bahawa pihak-pihak telah bersetuju bahawa baki harga belian adalah RM650,000 dan bahawa jumlah tersebut boleh dibayar selepas kaveat-kaveat dibatalkan dan setelah milikan kosong diserahkan.

**Diputuskan**, memerintahkan defendan menyelesaikan jualan:

(1) Adalah tidak betul untuk kes plaintif sendiri yang mana defendan perlu membuktikan bahawa bayaran-bayaran tersebut tidak diterima. Ia adalah untuk plaintif membuktikan apa yang beliau telah terima itu bukan sebahagian daripada bayaran tersebut. Perjanjian itu tidak menetapkan tempoh masa di mana baki jumlah RM750,000 patut telah dibayar oleh pembeli yang mengeluarkan sejumlah 20% saham biasa dalam bentuk modal berbayar syarikat pembeli yang perlu dipatuhi. Bahkan didapati bahawa jurang dalam kes plaintif juga mencadangkan bahawa plaintif atas pencabulannya sendiri telah bersetuju terhadap perubahan-perubahan tersebut dalam pelaksanaan peruntukan-peruntukan kl 2 perjanjian itu. Keterangan plaintif yang bercanggah dan nilai probatif yang tidak kukuh yang diletakkan ke atas dokumen-dokumen yang merupakan keterangan sekunder tidak membantu

dalam membuktikan pengataan plaintif tentang pindah milik tidak sah itu berdasarkan tiadanya persetujuan mahupun fraud (lihat perenggan 12–14).

(2) Di pihak defendan bagaimanapun, kes untuk tuntutan balas juga tidak dibuktikan (lihat perenggan 15).

(3) Atas imbangan kebarangkalian plaintif gagal membuktikan kes untuk tuntutan mereka seperti yang ditegaskan dalam penyataan tuntutan. Namun dengan tanah yang telah dipindah milik, defendan juga gagal menerangkan pengataan penyelesaian perubahan harga yang dikehendaki untuk menyelesaikan baki jumlah harga belian sebagai penyelesaian penuh harga belian dalam tempoh yang munasabah selepas dan semasa pembatalan kesemua kaveat yang dimasukkan ke atas tanah tersebut (lihat perenggan 22). ]

**Notes**

For cases on breach of contract, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3935–3959.

For cases on secondary evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1243–1258.

**Cases referred to**

*Hurst v Bryk* [1998] 2 MLR 269 (refd)
*Lim Tjoen Kong v A-B Chew Investments Pte Ltd* [1991] 3 MLJ 4 (refd)
*Moschi v Lep Air Services* [1973] AC 331 (refd)

**Legislation referred to**

National Land Code 1965 ss 340, 417

*DP Vijandran (R Kengadharan with him) (R Kengadharan & Co) for the plaintiff.*
*Francis Brigged (Eric Anthony with him) (Francis Brigged & Co) for the defendant.*

**Heliliah J:**

**[1]** In this action filed on 4 March 1996. The plaintiff claimed, inter alia, for the following orders:

(a) the agreement dated 12 December 1991 executed between the plaintiff and the defendant be terminated by reason of the defendant's breach;

(b) the sum of RM250,000 paid by defendant to the plaintiff as deposit shall be retained by the plaintiff towards settlement of damages;

(c) an order pursuant to s 417 of the National Land Code 1965 instructing the Pahang Registrar of Titles to rectify the register wherein the plaintiff is to be restored as the lawful registered owner of the said land;

(d) general damages for breaching the said agreement.

**[2]** According to the text of the copy of the agreement that was produced in court, the plaintiff and defendant had on 12 December 1991 executed an agreement ('the agreement') wherein the defendant had agreed to purchase land identified as

A QT(R)9, Lot No LOCH 235/62 Mukim Tanah Rata of Cameron Highlands in the state of Pahang Darul Makmur ('the land'). As stated in the statement of claim the essential terms of the agreement are as follows:

(a) purchase price of the said land is RM1,000,000;

B (b) the defendant agreed to pay the plaintiff RM250,000 by way of deposit and part payment towards the purchase price;

(c) the defendant is to pay the balance purchase price amounting to RM750,000 in the form of shares constituting 20% of the defendant's paid up capital in the name of the plaintiff;

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(d) the defendant within two weeks from the date of receipt of the issue document of title registered in the name of the plaintiff from the plaintiff's solicitor is to deliver all applications accompanied by building plans and development and construction specifications of a hotel an/or a condominium on the said land;

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(e) the defendant will obtain approval from the relevant authorities in respect of the construction on the said land before the expiry of two years from the date of the agreement ie on or before 12 December 1993;

(f) the defendant is only to register the adjudicated transfer for the said land upon E full payment of the purchase price to the plaintiff as stated in paragraph (c) above.

**[3]** The breach alleged are as follows:

F (a) the defendant failed to make full payment of the purchase price as stated in para C hereinabove;

(b) the defendant failed to obtain the necessary approvals from the relevant authorities to develop the said land on or before 12 December 1993;

(c) the defendant unlawfully caused the Pahang Registrar of Titles to register the G transfer of the said land in the name of the defendant although the full purchase price for the said land was yet to be paid to the plaintiff. The transfer of the said land was effected without the knowledge and approval of the plaintiff.

H **[4]** The original statement of claim was amended on 25 February 2002. The defence in general claimed that there was a variation to the terms of the agreement and that on 9 December 1994 the parties had embarked on variation of the terms of the agreement where the balance of purchase price was also adjusted. The defendant also denied that there was an unlawful transfer of the land. And by I way of a counter claim the defendant sought the following relief:

(a) for a declaration that the parties have settled and agreed that the outstanding balance of the purchase price payable to the plaintiff is only a sum of RM650,000 and that the terms of the agreement dated 12 December 1991 had been varied by the subsequent dealings of the parties;

(b) a declaration that the said sum of RM650,000 was payable subject to the terms that the said sum be paid after removal of the caveats and upon vacant possession being given;

(c) that the parties do execute the sales and purchase agreement as varied;

(d) damages.

**[5]** The case had been handled by a few legal firms engaged by the plaintiffs and had also undergone through stages of case management.

**[6]** However when the trial was commenced after being dormant, learned counsels for the plaintiff and defendant could not attain a consensus on the documents to be used. It was averred that there were bundles of documents that were stamped 'Without Prejudice'. This court was compelled to have a hearing on the admissibility of documents. Having determined that the court should peruse the documents the ruling was made that those documents pertain to several negotiations that did not lead to a settlement and hence upheld the objections on the admissibility of those documents having relied on the case of *Lim Tjoen Kong v A-B Chew Investments Pte Ltd* [1991] 3 MLJ 4.

**[7]** On the hindsight this was perhaps an unfortunate situation which did not seem to assist the plaintiff's case or the defendant's case. It is also in evidence that other objections were made to encl 151 which comprised several other documents relied upon by the defendant. However in the course of the trial the objections were withdrawn and some of the documents in encl 151 were allowed to be referred to. However it is incumbent upon me to observe that apart from P1, P2 and P3 which were documents which relate to the title, admitted in the form of certified true copies, the documents relied by both the plaintiffs and defendant were secondary evidence. This in my view is the upshot of the case having been dormant and if it were not for the exercise to dispose of pre-2000 cases it may well have lain dormant.

**[8]** Be that as it may the following decision is based on the oral evidence of the witnesses and the documentary evidence relied by the parties. The plaintiff has to establish his case on the balance of probabilities. Central to this case is the allegedly illegal or unlawful land transfer.

**[9]** According to cl 2 of the agreement the plaintiff was required to execute a valid and negotiable memorandum of transfer. It is in evidence in P3 that the Form 14A regarding the transfer bears a date 24 January 1992 and which bears the signature of the plaintiff. The issue is whether the consent is said to be vitiated because there was an absence of consent or because of fraud which in the case of the latter requires proof beyond reasonable doubt. With regard to the issue of consent the plaintiff had given conflicting evidence as to the circumstances in which he acquired or did not acquire knowledge on the actual date of transfer. On the one hand he stated that he did not know but on the other hand he stated that he did know but that the defendant had failed to observe their side of the bargain in issuing the 20% shares in the company as specified in the agreement.

**[10]** The plaintiff had relied on a letter written by one of his former solicitors (p 7 of the defendant's bundle). This letter is only a copy. It only indicates that the Memorandum of Transfer together with the issue document of title had been submitted. However the plaintiff had not discharged the onus of establishing that he did not know or that he had not consented. This evidence is interwoven with two facts. Firstly the alleged common solicitor who was responsible in the preparation of the documents was no longer able to testify in view of his demise on 15 December 1996. This has contributed to a gap even in the plaintiffs case. In his absence para 4 of the supplementary witness statement of the plaintiff is found to be self-serving and contained hearsay evidence.

**[11]** The second fact is that the plaintiff is unable to furnish evidence to refute the claims of the defendant that he had received payments of money which may explain why he has been conceding to the acts of the deceased solicitor. Again his oral testimony had been conflicting.

**[12]** It cannot be that for the plaintiff's own case it is the defendant which has to establish that payments were not received. It is for the plaintiff to establish what he has received are not part of the payments. The agreement did not stipulate the time frame within which the balance sum of RM750,000 which shall be deemed to have been paid by the purchaser issuing a total of 20% ordinary share in the paid up capital of the purchaser's company is to be complied with.

**[13]** Moreover it is found that the gap in the plaintiff's case may also suggest that the plaintiff on his own volition had acquiesced in the changes in the implementation of the provisions of cl 2 of the agreement.

**[14]** The plaintiff's conflicting evidence and the lack of probative value to be given to the documents which are secondary evidence have not assisted in establishing the plaintiff's allegation of an unlawful transfer based on lack of consent or let alone fraud.

**[15]** On a hindsight the exclusion of the 'Without Prejudice' documents have also actually operated against the plaintiff. On the part of the defendant however due to the exclusion of those documents, the case for the counter claim is also not established.

**[16]** The court has to consider further the letter purported to be written on 5 May 1994 by one of the plaintiff's former solicitor (p 83 Common Bundle) Paragraph 4 of the letter states.

> *In the light of the above, our client instructs us that he is no longer interested in the total performance of the agreement and therefore considers the agreement terminated with the consequences as follows:*
>
> (a) That you do pay our client the balance sum of RM750,000 in lieu of the shares mentioned above; OR

(b) That you return the title deed to our client, with no further claims wherein our client forfeits the RM250,000 as damages. A

(Emphasis added.)

**[17]** It is found that by this letter the plaintiff had effectively terminated the agreement. I agree with the learned counsel for the defendant that since the plaintiff has alleged breaches of the agreement the plaintiff was in a position to treat the agreement as subsisting and to pray for specific performance and or damages for breach. Instead the plaintiff has opted to terminate the agreement and which means having failed to establish that there was no valid transfer to the title the plaintiff is wrong in praying for an order that the agreement is to be terminated (when it has been effected) and praying for an order that the document be re-registered. B C

**[18]** It is found that it is untenable that the plaintiff prays for the instrument of title to be registered in his name and yet deny the defendant's position to rely on the relevant provisions of s 340 of the National Land Code 1965. D

**[19]** The court however is still confronted with question of the balance of justice in this case since the plaintiff himself had considered the agreement to be terminated and the title has been transferred. Again I agree with the learned counsel for the defence that since no attempt was indicated to comply with the other provisions namely cl 4, the plaintiff cannot now retract from the position stated in the letter of 5 May 1994. The plaintiff by that letter had deprived himself of the right to require the defendants to continue to perform the other obligations under the agreement. *Hurst v Bryk* [1998] 2 MLR 269, p 287, *Moschi v Lep Air Services* [1973] AC 331, p 345. But this was an agreement where RM250,000 had been stated in Clause 1 to have been paid and agreed as being part of payment of the purchase price. Again the plaintiff has been evasive as to the amounts that he had received. His credibility is questionable. E F

**[20]** The court does not take into account the evidence of PW3 for the purpose of the present proceeding as they are found to be irrelevant. It is an attempt to indicate future economic losses as opposed to losses arising from the alleged breach. In any event the plaintiff is vague about the date that the so called projection had been made bearing in mind that the letter of termination had been sent to the defendants. It is also found that the references to the various caveats that have been lodged have not thrown any light on the plaintiffs case. In my view it also serves to indicate a situation that kept on changing between the two parties. G H

**[21]** Having regard to the aforementioned matters I therefore find that the plaintiff has, on a balance of probabilities failed to establish a case for their claim as averred in the statement of claim. However with the land already transferred, the defendant having equally failed to account for the alleged settlement of a varied price is hereby required to settle the remainder of the amount of purchase price as full settlement of the purchase price. I therefore hold as follows: I

(i) the land remains registered in the name of Ritz Garden Hotel (Cameron Highlands) Sdn Bhd;

A (ii) the defendant do pay the plaintiff the remainder of the purchase price that is RM750,000 within a reasonable time after and upon a removal of all the caveats lodged in respect of the land;

(iii) costs to be borne by each party.

B *Defendant ordered to complete sale.*

Reported by Brendan Navin Siva

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